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No. 87-682

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

TECHNOGRAPH LIQUIDATING TRUST,
Petitioner,

v.

GENERAL MOTORS CORPORATION,
Respondent.

RESPONDENT GENERAL MOTORS' OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED
(Affirmatively Stated)

1. The decision below will not affect anyone other than the parties to this thirty-one year old lawsuit, which the District Court noted "threatens to outlast all human participants" (10a).[1] The facts of this case do not lend themselves to a definitive ruling by the U.S. Supreme Court establishing bright line boundaries under 28 U.S.C. §1295(a)(1) for the jurisdiction of the Federal Circuit, since all issues arising under the patent laws were finally adjudicated prior to the creation of the U.S. Court of Appeals for the Federal Circuit in October 1982. The issues raised in the Petition are thus of no public importance.

2. The decisions of both the Federal Circuit and the Third Circuit that the appeal should be heard in the Third Circuit are consistent and logical and not in conflict with decisions of other Courts of Appeal. The weakness of petitioner's position is shown by its bootstrap suggestion that certiorari should be granted in the totally unrelated case of *Christianson v. Colt Industries Operating Corporation*, 822 F.2d 1544 (Fed. Cir. 1987), petition for cert. pending, No. 87-499 (filed September 23, 1987), and that this case should tag along with *Christianson, Id.*

3. The decision below does not deal with issues worthy of certiorari. The Federal Circuit was correct in transferring the appeal to the Third Circuit pursuant to 28 U.S.C. §1631 and the Third Circuit was correct in refusing to transfer the case back to the Federal Circuit because there was no jurisdiction in

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[1] (___ a) references are to pages of Petitioner's Appendix.

the Federal Circuit; all patent issues in the litigation having been finally adjudicated prior to 1982. As required by §1631, it was in the interest of justice not to burden the Federal Circuit with the responsibility of studying an ancient and enormous record, when the Third Circuit had already decided three previous appeals involving all patent and some nonpatent issues.

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STATEMENT OF THE CASE

A.

Petitioner appealed from the June 27, 1986 decision of the U.S. District Court for Delaware to the U.S. Court of Appeals for the Federal Circuit. GM's motion under 28 U.S.C. §1631 to transfer the appeal to the U.S. Court of Appeals for the Third Circuit was granted by the Federal Circuit. Petitioner's motion in the Federal Circuit for reargument of the transfer motion and its suggestion that the motion be reheard

en banc were each denied. Petitioner's motion in the Third Circuit seeking transfer back to the Federal Circuit was also denied (la-8a).

Petitioner filed petitions for writs of certiorari from the Federal Circuit's Order transferring the case to the Third Circuit and from the Third Circuit's refusal to transfer the appeal back to the Federal Circuit. Both of these petitions were denied by this Court (55 USLW 3601 (March 9, 1987)) and the Third Circuit on June 29, 1987 affirmed the decision of the District Court (24a-25a). This is the third time petitioner has sought certiorari to review the same jurisdictional question.

B.

This case has been pending for over thirty years. It involved a patent which expired over eighteen years ago. There have been three separate trials (validity—infringement—accounting); five appeals and nine petitions for certiorari.

The subject matter of petitioner's latest appeal from the Delaware District Court involves a non-patent issue—whether petitioner is entitled to additional interest on postjudgment interest previously paid into Court by GM. Petitioner also attempted to reopen and review the Third Circuit's 1981 judgment holding that petitioner was not entitled to damages relating to GM's production of non-bumper parts.

The Third Circuit had, prior to the latest appeal, already heard and decided the following three appeals from the District Court in this thirty-one year old litigation:

1. *Devex Corp. v. General Motors Corp.*, 467 F.2d 257 (3d Cir. 1972), *cert. denied*, 411 U.S. 973 (1973) ruled (prior to the October 1982 establishment of the Federal Circuit) on the patent infringement issues.[2]

2. *Devex Corp. v. General Motors Corp.*, 667 F.2d 347 (3d Cir. 1981) affirmed (prior to October 1982) the District Court's "Final Judgment" awarding over $8.8 million for bumper part infringements, over $11 million in prejudgment interest and denying damages relating to non-bumper parts. Certiorari was granted on the prejudgment interest issue and the Third Circuit's decision was affirmed by this Court, *General Motors Corp. v. Devex Corp.*, 461 U.S. 648 (1983). Certiorari was denied the present petitioner on the non-bumper parts damages issue, 456 U.S. 988 (1982).

3. *Devex Corp. v. General Motors Corp.*, 749 F.2d 1020 (3d Cir. 1984) affirmed a ruling awarding petitioner over $7 million in postjudgment interest and interest on costs and denying petitioner so-called delay damages/compound interest on the postjudgment interest. This appeal was decided by the Third Circuit in 1984 after the Federal Circuit was created—every patent issue had already been decided. Petitioner conceded in its last petition for a writ of certiorari that the Third Circuit had jurisdiction over the appeal dealing with postjudgment interest because "[t]here were no patent law issues involved in the appeal." (Petition in No. 86-1179, p. 5). This conces-

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[2] The trial and appeal of the validity issues were in the U.S. District Court for the Northern District of Illinois and the U.S. Court of Appeals for the Seventh Circuit (*Devex Corp. v. General Motors Corp.*, 321 F.2d 234 (7th Cir. 1963), *cert. denied*, 375 U.S. 971 (1964)). On petitioner's motion, the case was transferred from Chicago to Delaware in 1965.

sion is diametrically opposed to petitioner's present position that the Federal Circuit has exclusive jurisdiction over another postjudgment interest claim—and that it also has jurisdiction to review the 1981 final judgment of the Third Circuit on non-bumper damages.

(a) Certiorari was denied on petitioner's attempt to obtain delay damages/compound interest on postjudgment interest and also on petitioner's attempt to reopen the issue of damages for non-bumper parts infringement, 106 S.Ct. 68 (1985). In addition to the petition for certiorari, petitioner also filed in this Court a "Motion for Leave to File Out-Of-Time Petition for Rehearing" on the non-bumper parts damages issue. This was also denied. 54 USLW 3228 (October 7, 1985).

C.

Early in 1986, petitioner filed a motion in the District of Delaware seeking additional interest on the postjudgment interest judgment and the interest on cost judgment that GM had paid into the District Court in 1983, pending the earlier appeal on these matters to the Third Circuit. Since the District Court still supposedly had this tag-end interest issue before it, petitioner also suggested that the District Court had the power to re-examine and reverse the Third Circuit's 1981 decision on the non-bumper parts damages issue. Petitioner's motions were denied by the District Court on June 27, 1986.

As noted, this is the third petition for a writ of certiorari filed by petitioner on the question of whether the appeal from the District Court's June 27, 1986 rulings should have been heard in the Third

Circuit or in the Federal Circuit. Petitioner hopes to forum shop and obtain another "bite of the apple" by resurrecting in the Federal Circuit its oft rejected arguments that it is entitled to damages concerning non-bumper parts. These arguments have already been unsuccessfully presented to the District Court, the Third Circuit and this Court on numerous occasions.

REASONS FOR DENYING THE WRIT

1.

The transfer by the Federal Circuit to the Third Circuit and the Third Circuit's refusal to transfer the case back to the Federal Circuit affects no one but the parties to this lawsuit and will not serve as precedent for future cases. The Third Circuit decided two appeals in this case prior to 1982 dealing with infringement, damages and prejudgment interest. One of these appeals included the non-bumper parts damages issue. The Third Circuit also heard an appeal in 1984 dealing with delay damages/compound interest on postjudgment interest. Since October 1982, the Federal Circuit has had jurisdiction over appeals in cases from federal district courts involving continuing issues arising under the patent laws. The factual situation in this case where appeals on all patent issues were decided by a regional court of appeals prior to 1982 and still further appeals in the litigation are filed after 1982 is transitory and unlikely to occur again as we move further in time from 1982. Even in 1983 the Federal Circuit referred to such situations as "transitory". *Central Soya Co., Inc. v. Geo. A. Hormel & Co.*, 723 F.2d 1573, 1580 (Fed.Cir. 1983).

The facts of this case do not present this Court with an opportunity to provide lasting guidelines for

whether appeals should go to the Federal Circuit or to a regional court of appeals. The issues raised in the petition are "episodic" and "academic" and are of no public importance. They do not warrant review by the Supreme Court. *Rice v. Sioux City Cemetery*, 349 U.S. 70, 74 (1955).

Indeed, the Order of the Federal Circuit transferring the appeal to the Third Circuit stated (2a):

> NOTE: This Order will not be published in a printed volume because it does not add significantly to the body of law and is not of widespread legal interest. It is a public record. It is not citable as precedent.

2.

A.

Petitioner exposes the weakness of its position by seeking to couple this petition with the one in *Christianson v. Colt Industries Operating Corp.*, No. 87-499 (filed Sept. 23, 1987). But that case involves totally unrelated issues and stands in stark contrast to this one.

—In *Christianson*, there was a vigorous disagreement on the jurisdictional issue between the Federal Circuit and the Seventh Circuit. Here the Federal Circuit and the Third Circuit are in complete accord.

—In *Christianson*, there were substantial patent issues still present in the case and there had been no prior appeals. Here, all patent issues were finally adjudicated prior to October 1982 and there were three earlier appeals to the Third Circuit.

—In *Christianson*, a ruling by the U.S. Supreme Court might provide permanent guidance for future

cases where a complaint seeks no direct relief under the patent laws but resolution of the litigation will deal with substantial patent issues. Here, a ruling will deal with what is at most a transitory situation that will never again occur.

—In *Christianson*, one of the "Questions Presented" is "[w]hether a U.S. Court of Appeals may rule on the merits of an appeal when it expressly rules that it does not have subject matter jurisdiction pursuant to statute." Here, there was no ruling by the Federal Circuit or the Third Circuit that the Third Circuit did not have subject matter jurisdiction.

To consolidate this case with *Christianson*, *Id.*, would complicate rather than clarify the jurisdictional issues presented in *Christianson*. Furthermore, large portions of the petition in *Christianson* deal with issues other than jurisdiction—i.e., the interrelationship of patent law, trade secret law, and antitrust law.

B.

Likewise, petitioner's reliance (Pet. pp. 8, 9) on *U.S. v. Hohri*, 107 S.Ct. 2246 (1987) is misplaced. There is no conflict between the decision below and *Hohri*, which dealt with the placement of many Japanese-Americans in internment camps during World War II. The question whether the Federal Circuit or the District of Columbia Circuit had jurisdiction over the appeal in *Hohri* hinged on a detailed analysis of the "ambiguity inherent" in the wording of §1295(a)(2) (p. 2251). This analysis is of no relevance to the present petition directed to the completely different and separate provisions of 28 U.S.C. §1295(a)(1).

3.

A.

The decision below does not conflict with other decisions of Courts of Appeal as suggested by petitioner (Pet. pp. 5, 6, 8). *Kidde, Inc. v. E.F. Bavis & Assoc.*, 735 F.2d 1085 (8th Cir. 1984) and *Atari, Inc. v. JS&A*, 747 F.2d 1422 (Fed. Cir. 1984) do indeed hold that the Federal Circuit has exclusive jurisdiction under 28 U.S.C. §1295(a)(1) of an appeal from a decision of a district court if the jurisdiction of the district court arose under the patent laws. The jurisdiction of the District Court at the time of its June 1986 ruling however did not arise under the patent laws—all patent issues had been finally adjudicated prior to October 1982.

While the case contained substantial patent issues for a long time, there are none now present. The non-bumper damages issue was determined by the Special Master, the District Court (which issued a "Final Judgment" on October 6, 1980), and the Third Circuit (which in 1981 affirmed the "Final Judgment" of the District Court). Petitions for certiorari on the point have been repeatedly denied. It is hard to imagine anything more final—or less deserving of certiorari.

The Federal Circuit had no jurisdiction over the appeal in this case since patent law questions no longer continue to be present, notwithstanding the fact that the complaint when filed in 1956 properly alleged jurisdiction under 28 U.S.C. §1338. *USM Corporation v. SPS Technologies, Inc.*, 770 F.2d 1035 (Fed. Cir. 1985); *Atari*, 747 F.2d 1422.

As the Federal Circuit held in *Atari*, 747 F.2d 1429:

> Achievement of increased uniformity in the substantive law of patents does not require that this court get its hands on every appeal involving an allegation that a patent law issue is somehow involved. . . . [A] mere allegation that patent law is involved will not give this court jurisdiction when that of the district court did not rest at least in part on *a continuing* claim arising under the patent . . . laws (emphasis added).

In other places in *Atari*, *Id.*, the Court referred to the need for a "continuing non-frivolous patent claim under §1338" in the district court, for the Federal Circuit to have jurisdiction over an appeal (*Id.*, pp. 1433, 1437). The non-bumper parts damages issue which was in this case years ago has not by any realistic standard remained a continuing, non-frivolous patent claim under §1338. The only issue properly before the District Court in June of 1986 was the non-patent question of whether petitioner was entitled to additional postjudgment interest on money previously paid into Court.

Thus, there is no conflict between the decision below and cases holding that the Federal Circuit has exclusive jurisdiction over rulings of district courts in cases arising under the patent laws.

B.

There is also no conflict between the decision below and cases cited by petitioner (Pet. p. 9) for the proposition that jurisdictional statutes such as 28 U.S.C. §1295 "cannot be ignored for reasons of either fair-

ness or efficiency" *Professional Managers' Association v. United States*, 761 F.2d 740, 745 (D.C. Cir. 1985); *Owen Equipment & Erection Co. v. Kroger*, 437 U.S. 365 (1978).

The jurisdictional statute was not ignored by the Federal Circuit or the Third Circuit. What the Federal Circuit did here in transferring the appeal to the Third Circuit pursuant to 28 U.S.C. §1631 was to follow its ruling in *USM Corp.*, 770 F.2d 1035, which was cited in the Order transferring this case to the Third Circuit (3a).

In *USM Corp., Id*, the Federal Circuit phrased the issue quite properly to be whether it had jurisdiction (770 F.2d at 1036, 1037):

> This appeal *raises the question of our jurisdiction* over an appeal where the Seventh Circuit has finally adjudicated all patent issues and only non-patent issues remain, in a case where the jurisdiction of the district court was originally based, in part, upon 28 U.S.C. §1338(a). (emphasis added).
>
> * * *
>
> Policies of judicial efficiency favor transferring the appeal to the Seventh Circuit. This case has already been before the Seventh Circuit twice on appeal with many of the underlying issues fully briefed by the parties to that Court.

It is clear that questions of jurisdiction, fairness and efficiency are not always neatly compartmentalized and the fact that fairness and efficiency are mentioned does not mean that jurisdiction was ignored.

It is also clear that the *USM Corp.* case and this case are remnants of a probably now extinct species— an appeal prior to 1982 to a regional court of appeals and a subsequent appeal raising a question of the Federal Circuit's jurisdiction.

Another example of this type of perfectly proper analysis is found in *Atari*, 747 F.2d 1428, 1429:

> The present motion enables the court, with the appreciated cooperation of ten *amici*, to respond in part to Congress' expectation that it would formulate appropriate standards for determining jurisdiction.
>
> * * *
>
> That this court upholds its jurisdiction here does not preclude a contrary holding in future, different cases. Nor does it preclude transfer under 28 U.S.C. §1631 of an appeal so devoid of patent issues, present or potential, as to suggest transfer. Federal courts have declined jurisdiction over pendent and ancillary claims in the interest of "judicial economy, convenience, and fairness to litigants." *United Mine Workers of America v. Gibbs*, 383 U.S. 715, 726, 86 S.Ct. 1130, 1139, 16 L.Ed.2d 218 (1966).

28 U.S.C. §1631 allows a transfer from one Court of Appeals to another where there is a "want of jurisdiction. . .if it is in the interest of justice. . ." All issues arising under the patent laws having been decided prior to the creation of the Federal Circuit, there was no jurisdiction in the Federal Circuit over the latest appeal and §1631 directs the courts to consider the interest of justice along with the jurisdic-

tional issue. The Third Circuit on three prior occasions had considered the ancient and enormous record in this case and it was in the interest of justice not to require the Federal Circuit to duplicate this effort.

CONCLUSION

1. The decision below (a) deals with petitioner's attempt to be awarded additional money and involves no issues of public importance; (b) is not in conflict with decisions of other Courts of Appeal; (c) is totally unrelated to the issues in *Christianson v. Colt*, *supra*; and (d) was decided correctly.

2. A decision in a case filed over thirty years ago, where there were numerous appeals filed prior to the October 1982 establishment of the Federal Circuit and where all issues arising under the patent laws were finally adjudicated prior to October 1982 will provide no clarification or guidance for future cases.

3. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX A

Pursuant to Supreme Court Rule 28.1 the following information is provided by General Motors Corporation.

General Motors Corporation is not a subsidiary of a publicly owned corporation. All subsidiaries and affiliates of General Motors Corporation are wholly-owned except:

Alambrados Automatrices, S.A. C.V. (Mexico)

Alambrados y Circuitos Electricos, S.A. de C.V. (Mexico)

AMBRAKE Corporation (USA)

Aralmex, S.A. de C.V. (Mexico)

Autos y Maquinas del Ecuador S.A. (AYMESA) (Ecuador)

Cableados de Juarez, S.A. de C.V. (Mexico)

CABLESA-Industria de Componentes Electricos Limitada (Portugal)

Calsonic Harrison Co., Ltd. (Japan)

Compania Nacional de Direcciones Automotrices, S.A. de C.V. (Mexico)

Componentes Delfa, C.A. (Venezuela)

Componentes Mecanicos de Matamoros, S.A. de C.V. (Mexico)

Conductores y Componentes Electricos, de Juarez, S.A. de C.V. (Mexico)

Convesco Vehicle Sales GmbH (West Germany)

Daewoo Automotive Components, Ltd. (Korea)

Daewoo Motor Co., Ltd. (Korea)

Delco Electronics Corporation (USA)

Delkor Battery Company, Ltd. (Korea)

Delmex de Juarez, S.A. de C.V. (Mexico)

Delredo, S.A. de C.V. (Mexico)

Detroit Deere Corporation (USA)

DHB - Componentes Automotivos S.A. (Brazil)

DHMS Industries, Ltd. (Korea)

DR DE CHIHUAHUA, S.A. de C.V. (Mexico)

Fabrica Columbiana de Automotores S.A. ("Colomotores") (Columbia)

General Motors de Colombia S.A. (Colombia)

General Motors del Ecuador S.A. (Ecuador)

General Motors Egypt, S.A.E. (Egypt)

General Motors Espana, S.A. (Spain)

General Motors (Europe) AG (Switzerland)

General Motors France (France)

General Motors Hellas, A.B.E.E. (Greece)

General Motors Iran Limited (Iran)

General Motors Kenya Limited (Kenya)

General Motors Korea Co., Ltd. (Korea)

General Motors del Peru S.A. (Peru)

General Motors de Portugal, Limitada (Portugal)

General Motors Terex do Brasil Ltda. (Brazil)

GM Allison Japan Limited (Japan)

GM Locomotivas Ltda. (Brazil)

GMFanuc Robotics Coporation (USA)

Hua Tung Automotive Corporation (Rep. of China)

Ilmor Engineering, Ltd. (England)

Industries Mecaniques Maghrebines, S.A. (Tunisia)

Industrija Delova Automobila, Kikinda (Yugoslavia)

INLAN-Industria de Componentes Mecanicos, Lda. (Portugal)

Isuzu Motors Limited (Japan)

Isuzu Motors Overseas Distribution Corp. (Japan)

Kabelwerke Reinshagen GmbH (West Germany)

Kabelwerke Reinshagen Werk Berlin GmbH (West Germany)

Kabelwerke Reinshagen Werk Neumarkt GmbH (West Germany)

Koram Plastics Company, Ltd. (Korea)

Metal Casting Technology, Inc. (USA)

Motor Enterprises, Inc. (USA)

New United Motor Manufacturing, Inc. (USA)

NHK Inland Corporation (Japan)

Omnibus BB Transportes, S.A. (Ecuador)

Promotora de Partes Electronicos Automotrices (Mexico)

P.T. Mesin Isuzu Indonesia (Indonesia)

Rimir, S.A. de C.V. (Mexico)

Rio Bravo Electricos, S.A. de C.V. (Mexico)

Senalizacion y Accesorios del Automovil Yorka, S.A. (Spain)

Shinsung Packard Company, Ltd. (S. Korea)

Sistemas Electricos y Conmutadores, S.A. de C.V. (Mexico)

Sung San Company, Ltd. (S. Korea)

Suzuki Motor Co., Ltd. (Japan)

TEREX Equipment Limited (Scotland)

Vauxhall Motors Limited (England)

Vestiduras Fronterizas, S.A. de C.V. (Mexico)

Volvo GM Heavy Truck Corporation (USA)

Some of the processes accused as infringements were performed by General Motors using materials purchased under indemnity agreements with one or more of the following:

1. Anchem Products, Inc. (Union Carbide)
2. Bethlehem Steel Corporation
3. Braun Engineering Company (Masco Corp.)
4. Colt Industries, Inc.
5. LTV Corporation
6. Occidental Petroleum Corp.
7. Pennwalt Corporation
8. Republic Steel Corp.
9. United States Steel Corp.